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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, SELMA DIAMOND, JOSEPH HOLLAND, Commisioner of the Division of Housing and Community Renewal of the State of New York, DENNIS C. VACCO, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

—against—

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

VICTORIA A. GRAFFEO
Solicitor General

GARY R. CONNOR
Assistant Attorney General
Counsel of Record

KAREN S. SMITH
Assistant Attorney General
Of Counsel

DENNIS C. VACCO
Attorney General of the
State of New York
Petitioner Pro Se and Attorney for Petitioners Holland and the New York State Division of Housing and Community Renewal
120 Broadway - 23rd Floor
New York, New York 10271
(212) 416-8170

(*counsel continued on inside front cover*)

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New York State Division of
Housing and Community
Renewal
Cullen McVoy
Richard Hartzman
Of Counsel
Attorneys for Petitioners
Holland and DHCR
One Fordham Plaza
Bronx, New York 10458
(718) 563-5836

DON D. BUCHWALD
Buchwald & Kaufman
Attorney for Petitioner
Susan Solomon Pattulo
600 Third Avenue
New York, New York 10016
(212) 661-0040

COLLEEN F. MCGUIRE
Attorney for Petitioner
Lloyd Ribner, as Executor of
the Estate of Muriel Ribner,
deceased
349 Broadway, 2nd Floor
New York, New York 10013
(212) 431-3112

ELI R. MATTIOLI
Wien, Malkin & Bettex
Attorney for Petitioner
Selma Diamond
60 E. 42nd Street
New York, New York 10165
(212) 687-8700

QUESTION PRESENTED

Whether the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a *et seq.*, the federal statute enacted to provide for the resolution of failed savings and loan institutions, authorizes the Resolution Trust Corporation to repudiate statutory tenancies in disregard of New York State's securities and rent regulatory laws.

LIST OF PARTIES

The following parties were appellees in the court below: Selma Diamond, Ira Kaufman, Jerome Lederer, Peggy Lehman, Susan Solomon Pattullo, Horace Solomon, Lillian Solomon, Denise Tucker, Lloyd Ribner, as Executor of the Estate of Muriel Ribner, deceased, the New York State Division of Housing and Community Renewal ("DHCR"), Donald Halperin, as Commissioner of DHCR and G. Oliver Koppell, as Attorney General of the State of New York.

Of these appellees, Susan Solomon Pattullo, Selma Diamond, Lloyd Ribner, and DHCR are petitioners herein. Dennis C. Vacco, who succeeded appellee G. Oliver Koppell as Attorney General of the State of New York on December 30, 1994, and Joseph Holland, who succeeded appellee Donald Halperin as Commissioner of DHCR on December 30, 1994, are also petitioners herein, both automatically substituted as parties pursuant to Fed. R. Civ. P. Rule 25(d). Appellees Ira Kaufman, Peggy Lehman and Horace Solomon, individually and as executor of the estate of Lillian Solomon, are submitting a separate petition for a writ of certiorari. Appellee Jerome Lederer has died and his estate is not seeking review of the judgment below.

The appellant below, the Resolution Trust Corporation, as receiver for Nassau Savings and Loan Association, F.A., is the respondent herein.

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IN THE

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No. _____

SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, SELMA DIAMOND, JOSEPH HOLLAND, Commisioner of the Division of Housing and Community Renewal of the State of New York, DENNIS C. VACCO, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

—against—

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this action on January 20, 1995, which reinstated a prior judgment and opinion of the Second Circuit entered on March 2, 1994.

OPINIONS BELOW

The January 20, 1995 opinion of the Court of Appeals for the Second Circuit is (to be) reported at 45 F.3d 665 (2d Cir.

1995) and is reprinted in the appendix to the petition at 1a to 26a.[1] The opinion was issued after this Court granted two petitions for certiorari, vacated the March 2, 1994 judgment of the Second Circuit, and remanded the case for reconsideration in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). The remand orders are reported *sub nom Solomon v. RTC*, 115 S. Ct. 43 (1994) and *Pattullo v. RTC*, 115 S. Ct. 44 (1994), and are reprinted in the appendix at 88a to 90a. The March 2, 1994 opinion of the Second Circuit is reported at 18 F.3d 111 (2d Cir. 1994) and is reprinted in the appendix at 27a to 61a. The memorandum opinion of the United States District Court for the Southern District of New York (Carter, J.) is reported at 801 F. Supp. 1152 (S.D.N.Y. 1991) and is reprinted at 62a to 84a.

JURISDICTION

The judgment of the Second Circuit was entered on January 20, 1995. On March 7, 1995, the Second Circuit stayed issuance of the court's mandate pending filing of a petition for certiorari by March 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutes and regulations are reproduced in the appendix at 91a to 98a. The relevant federal statutory provisions are found under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441 *et seq.* and apply to both RTC and the Federal Deposit Insurance Corporation.

Of particular relevance are 12 U.S.C. §§ 1821(e)(1) and 1821(e)(5)(A).

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[1] References to the petitioners' appendix are cited as "__a". The joint appendix in the court below is referred to as "JA-__".

12 U.S.C. § 1821(e)(1) provides that:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any depository institution may disaffirm or repudiate any contract or lease:
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. §1821(e)(5)(A) provides that:

> If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—
>
> (i) treat the lease as terminated by such repudiation; or
>
> (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

The relevant New York statutory and regulatory provisions are the Emergency Housing Rent Control Law, L. 1946, c. 274 (codified at N.Y. Unconsol. Laws §§ 8581-8597 [McKinney 1987]); Admin. Code of the City of N.Y. §§ 26-401-415 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987] ("N.Y.C. Admin. Code"); N.Y.C. Admin Code §§ 26-501-520 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987]); 9 NYCRR 2520 *et seq.* (reported

following N.Y. Unconsol. Laws § 8634 [McKinney 1987]); and N.Y. Gen. Bus. Law § 352 *et seq.*

STATEMENT OF THE CASE

Since 1946, New York has periodically enacted and extended a series of rent regulatory laws to protect its citizens from eviction. The enactment of these laws has been based upon a finding that a housing emergency exists in certain areas of the State of New York. (N.Y.C. Admin. Code §§ 26-401, 26-501.)[2] This case involves a challenge to those laws by the Resolution Trust Corporation ("RTC").[3] RTC claims that it may "disaffirm or repudiate any contract or lease" to which a failed institution is a party and which it deems burdensome. 12 U.S.C. § 1821(e)(1). It further contends that its repudiation power extends to statutory tenancies which are governed pursuant to the historic emergency housing laws enacted by the states. Petitioners maintain that Congress, in employing the terms "contract" and "lease", never intended to authorize RTC's repudiation of such statutory tenancies.

A. New York's Rent Regulatory Scheme

New York has established two systems of rent-protected tenancies: rent control and rent stabilization.[4] Under both types of rent regulation, rental increases and continued occupancy are controlled by statute. *See, e.g.*, N.Y.C. Admin. Code § 26-405 (rent control); N.Y.C. Admin. Code § 26-511 (rent stabilization). The heart of these rent protection systems is that, as long as the legally prescribed rent is paid, tenants

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[2] *See also Sobel v. Higgins*, 188 A.D.2d 286 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 953 (1993); McKinney's *Session Laws*, L. 1982, c. 555, Legislative Findings § 1.

[3] RTC is the federal agency established to resolve the problems of failed savings and loan associations.

[4] This rent regulatory scheme is applicable mainly to New York City and its surrounding counties.

may not be evicted except for certain specified grounds. N.Y.C. Admin. Code § 26-408, reported following N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y.C. Admin. Code 26-511 and 9 NYCRR Part 2524.[5] Rent control does not require any lease agreement. *See, e.g.*, N.Y.C. Admin. Code § 26-408(a). Although rent stabilization utilizes leases to periodically increase rents, the absence of a lease does not affect the tenant's status as protected by the rent stabilization laws. *See, e.g.*, 9 NYCRR § 2522.5(b)(2).

Rent control is based upon a finding that a "serious emergency continues to exist in the housing of a considerable number of persons in the city. . . ." N.Y.C. Admin. Code § 26-401. Rent stabilization was adopted in New York City in 1969 because of a similar finding that a "serious public emergency continues to exist. . . ." N.Y.C. Admin. Code § 26-501. In 1993, New York again declared an emergency in housing in certain parts of the State and readopted the rent regulation enabling laws (with some modifications not relevant here) and extended them to June 15, 1997. McKinney's *Session Laws*, L. 1993, c. 253.

B. New York's Condominium Conversion Laws

New York has enacted a comprehensive set of laws which govern the conversion of residential rental properties to condominium ownership. N.Y. Gen. Bus. Law, art. 23-A, §§ 352-359-h (McKinney 1984). These laws, commonly referred to as the Martin Act, require, *inter alia*, that an offering plan disclosing all material facts be filed with the Attorney General

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[5] Grounds for eviction under both rent control and rent stabilization include breach of a substantial obligation of the tenancy, commission of a nuisance, illegal occupancy, refusal to provide reasonable access, or occupancy in premises undergoing an eviction-type cooperative conversion. In addition, there are procedures for terminating tenancies where an owner seeks to occupy the premises, where the tenant is not using the premises as a primary residence, or where an owner seeks to demolish or alter the premises.

of the State of New York prior to any public offer of a condominium unit for sale.[6] N.Y. Gen. Bus. Law § 352-e.[7]

In addition, for conversions in New York City and three suburban counties, the Martin Act sets forth certain rights for tenants. In particular, non-purchasing tenants under non-eviction type plans who are subject to rent control or rent stabilization remain so if they choose not to purchase their units. N.Y. Gen. Bus. Law §§ 352-eeee(2)(c)(ii) and (iii), 352-eee(2)(c)(ii) and (iii). Those tenants not subject to rent regulation receive protection from eviction except for certain "fault" grounds and cannot have their rents unconscionably increased. N.Y. Gen. Bus. Law §§ 352-eeee(2)(c)(iv), 352-eee(2)(c)(iv).

C. The Conversion Of The Premises

In May, 1982, the Attorney General accepted for filing an offering plan to convert the 45-unit rental building at 444 East 57th Street, Manhattan to condominium ownership. (JA-209). Originally, the plan provided that the tenants who elected not to purchase, except for eligible senior citizens or eligible disabled persons, could be evicted from their apartments three years after the plan was declared effective. N.Y. Gen. Bus. Law § 352-eeee(1)(f) and (g). In 1983, the tenants negotiated with the sponsor of the offering to amend the plan to permit tenants to purchase their units at a reduced purchase price or to remain as tenants as long as rent was paid and there were no defaults on their obligations under their tenancies. (JA-209, 364-372). Petitioners Pattullo and Ribner[8] are tenants

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[6] These laws also regulate other types of real estate securities: cooperatives, homeowners associations, timeshares and real estate syndications.

[7] These provisions also proscribe fraud and fraudulent practices. N.Y. Gen. Bus. Law §§ 352, 352-c.

[8] Muriel Ribner is now deceased. She is represented by Lloyd Ribner, the executor of her estate.

who relied upon this promise not to be evicted, and chose to remain as non-purchasing tenants. (JA-318-333, 475-478).

In early 1983, unit closings took place. (JA-210). The sponsor retained ownership of the units occupied by rent-regulated tenants who chose not to purchase. Those units were offered for sale, but prospective purchasers were warned in the offering literature that the tenants were entitled to remain in possession pursuant to the requirements of the Martin Act. (JA-377).

In 1984, the sponsor pledged ten of its unsold occupied rent-regulated units to Nassau Federal Savings and Loan Association ("Nassau Federal") as collateral for a loan of $3,200,000.[9] (JA-199). The loan was based on a valuation of the nine rent-regulated units as occupied by non-purchasing rent-regulated tenants. In July 1987, the sponsor of the offering defaulted on its loan and Nassau Federal commenced foreclosure proceedings. A foreclosure sale was held in March, 1989, at which time Nassau Federal, as the highest bidder, acquired title to the units. (JA-199-200). Upon acquisition of the units, Nassau Federal assumed the rights and obligations of the sponsor, as set forth by applicable rent control or rent stabilization provisions of state law, as well as the express terms of the offering plan. Among the applicable provisions of state law was the obligation of any new owner of the units to allow non-purchasing tenants to remain in occupancy. (JA-199).

D. The Enactment Of FIRREA And RTC's Repudiation

In 1989, Congress enacted FIRREA in response to the growing savings and loan crisis. With the enactment of FIRREA, Congress created the RTC to recapitalize the savings deposit insurance system and to provide for the expeditious resolution of failed savings and loan institutions. Sen Rep.

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[9] The units had an aggregate cash purchase price as vacant of $7,746,400. (JA-210). One unit was later sold and is not at issue.

No. 101-19, 101st Cong., 1st Sess. at 3. In order to accomplish these goals, RTC was given the authority to operate a failed institution as a conservator, preserving its assets and property, 12 U.S.C. § 1821(d)(2)(D), or as a receiver, liquidating its assets. 12 U.S.C. § 1821(d)(2)(E).

RTC was authorized, *inter alia,* to "disaffirm or repudiate any contract or lease" to which the failed institution was a party if, in its discretion, it determines the contract or lease to be "burdensome" and if such disaffirmance or repudiation will, in its opinion, "promote the orderly administration of the institution's affairs." 12 U.S.C. § 1821(e)(1). In addition, the statute provided that where RTC repudiates such a lease, the lessee has the right to "remain in possession of the leasehold interest for the balance of the term of the lease." 12 U.S.C. § 1821(e)(5)(A).

On or about March 16, 1990, RTC was appointed the receiver of Nassau Federal by the Office of Thrift Supervision ("OTS"). (JA-200). Title to the occupied rent-regulated units at the premises was formally taken on March 20, 1990, by a new federal savings and loan association, Nassau Savings and Loan Association, F.A. ("Nassau Savings"), organized by RTC pursuant to 12 U.S.C. § 1821(d)(2)(F). (JA-200). When RTC took possession of Nassau Federal, it succeeded to the rights, titles and obligations of Nassau Federal, including the obligations with regard to the nine rent-regulated, occupied apartments at 444 East 57th Street.[10] (JA-199).

On August 17, 1990, RTC wrote to the tenants in those nine units, advising them that it intended to repudiate and disaffirm the leases to their apartments. Tenants were advised that, under 12 U.S.C. § 1821(e)(5)(A), they could either treat their leases as terminated and vacate immediately or remain in pos-

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[10] There is no dispute that each of the nine units had been subject to either rent control or rent stabilization prior to the conversion of the premises to condominium ownership. (JA-77-78).

session for the balance of the lease term.[11] Alternatively, tenants were offered the right to buy their units at 90% of the appraised vacant value. (JA-214, 249-266).

The New York Attorney General objected to RTC's repudiation of the tenancies. (JA-94-97). RTC Executive Director David Cooke was also concerned about the legality of the attempted repudiation and this eventually led to a decision to suspend steps towards repudiation pending receipt of additional information, including an analysis of RTC's authority to repudiate, the number of units impacted by RTC's decision,[12] and whether any leases could be terminated within the framework of local law. After this review, however, RTC staff again recommended repudiation, acknowledging the "precedent setting" nature of their action. (JA-269).

Consistent with this recommendation, RTC adopted an across-the-board policy of repudiation applicable to all residential units in New York subject to state or local rent and/or securities regulation. The Policy Statement (A-39), adopted by the RTC Board on February 22, 1991, provided that RTC could repudiate burdensome leases when the family income was 115% or more than the HUD median income level for the area.[13] On February 25, 1991, RTC wrote to the tenants at the

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[11] In most cases, RTC deemed the lease terms to be ended as of September 30, 1990. (JA-249-266).

[12] According to RTC, by 1990 it estimated that it had 1,000 units in either cooperatives or condominiums under its control in the New York and New Jersey area and that this number could increase to 2,000 should seventeen additional failed savings and loan institutions come under its control as scheduled. RTC acknowledged that it might have even additional units in New York held by institutions located outside the Northeast Region. In addition, RTC was aware that there were other units under its control or ownership in New York which were held by institutions located outside the region. RTC was also aware that its projections did not include units held by the Federal Deposit Insurance Company ("FDIC"). (JA-272).

[13] In December, 1993, RTC raised this ceiling to 130%.

premises to "confirm" RTC's repudiation of their statutory tenancies.

E. Prior Proceedings

On February 25, 1991, RTC commenced an action in the United States District Court for the Southern District of New York for a declaration that it had authority, under FIRREA, to preempt New York law, repudiate the leases and tenancies for the nine rent-regulated units, evict the tenants without regard to state law and sell the units.[14] (JA-11-29). On March 11, 1991, New York State commenced its own action in the United States District Court for the Southern District of New York seeking a declaration that RTC cannot evict statutory tenants residing in cooperatives and condominiums established under state law and pursuant to an offering plan, and seeking an injunction barring RTC from attempting to evict the tenants in violation of the rent regulatory laws of the State or otherwise interfering with their rights.[15] The State also sought to enjoin RTC from engaging in any acts involving the offer of real estate securities without first complying with the State's disclosure requirements under the Martin Act. (JA-62-91). On May 30, 1991, the district court (Carter, J.) consolidated the two actions and, on January 10, 1992, the plaintiffs in both actions moved for summary judgment.

By judgment entered November 16, 1992, the district court granted the State's motion for summary judgment and denied summary judgment to the RTC. (85a-87a). In its decision (62a-84a), the court looked to state law for the definition of "contract or lease". It determined that New York's statutory tenancies are not based on leases or contracts, but rather, exist by reason of New York's emergency rent laws. It rejected

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[14] RTC invoked the jurisdiction of the federal district court pursuant to 12 U.S.C. § 1441a(1).

[15] The State invoked the jurisdiction of the federal district court pursuant to 12 U.S.C. § 1441a(a)(11) and 28 U.S.C. §§ 1331, 1346(a)(2) and 1361.

RTC's argument that New York's rent regulations and securities laws are preempted by FIRREA either expressly or because there is a conflict between federal and state laws. Therefore, the court held that the RTC exceeded its authority under 12 U.S.C. § 1821(e) when it attempted to repudiate the tenancies in question.

RTC appealed to the United States Court of Appeals for the Second Circuit. On March 2, 1994, the Second Circuit reversed the district court's holding that RTC could not repudiate New York's statutory tenancies. (27a-61a). The court held that the nine tenancies are grounded in a contract or lease, as defined by federal law, and thus fell within the express language of FIRREA. It acknowledged that the tenancies "are tightly regulated and policed", and that the "core" terms of the landlord-tenant relationship which are "indispensable" to the creation of a tenancy—the duration, or "term", and the price, or "rent"—are governed by New York's rent regulatory statutes. Nevertheless, the court determined that such regulation did not make the tenancies "non-contractual" in nature. (42a,47a).

The Second Circuit also rejected New York's alternative argument that, under 12 U.S.C. § 1821(e)(5)(A), even if the tenancies are found to be lease-based, the tenants could remain in possession of their apartments for the duration of their statutory tenancies, so long as they continued to pay rent, not just for the period during which their rate of rent remained in effect. The court determined that even though, under state law, these tenancies continue upon each reauthorization of the state statutes, the "acute financial emergency" RTC was designed to aid mandated a shorter duration. It specified the times at which the tenancies ended as being either the next lease renewal date for rent-stabilized tenants or the biennial January 1st date when rent-controlled tenants had their base rent reviewed.

Thereafter, petitions for issuance of a writ of certiorari were filed in this Court. On October 3, 1994, the petitions were granted, the judgment of the Court of Appeals was vacated and the case was remanded for further consideration in light of *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048.

Upon remand, the Court of Appeals on January 20, 1995, reinstated its previous opinion with one modification relating to the lease term. 45 F.3d 665 (2d Cir. 1995). Finding that RTC's cause of action to repudiate rent-regulated leases arises out of a provision in FIRREA which specifically creates a special federal rule of decision, the court rejected the application of state law and held that "nothing in *O'Melveny* . . . militates against" creating a federal law definition of "contract or lease". (12a).[16] Applying what it believed to be the common law definition of "contract or lease", the court found that the relationship between the parties commenced with a contract and any statutory tenancy obligations enacted pursuant to New York's police powers became part of the contract. It concluded that repudiation was therefore proper under federal law.

In addition, the Second Circuit found that "the non-eviction aspect of the state's rent regulation scheme directly interferes with the 'accomplishment and execution of the full purposes and objectives' " of RTC's repudiation power under FIRREA (22a), which, as the court saw it, is "the maximization of return on assets." (21a). Therefore, the court held that to the extent state law interferes with the operation of 12 U.S.C. § 1821(e), it is preempted.[17]

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[16] The Second Circuit denied a motion, pursuant to § 0.27 of the Rules of Court of the Second Circuit, to certify state law issues to the New York Court of Appeals.

[17] The circuit court modified its original holding defining "lease term" [12 U.S.C. § 1821(e)(5)] for rent-controlled tenancies and held that a rent-controlled tenancy terminates one year from the date a repudiation notice is served upon the tenant. (26a).

REASONS FOR GRANTING THE WRIT

This case merits review because it raises important issues of federal-state relations and because the Second Circuit's decisions are in conflict with relevant state and federal case law.

The Second Circuit's decisions in this case impermissibly sweep away important aspects of the historic balance between the powers of the federal government and the powers of the states—the right of states to exercise their emergency police powers to protect their citizens' homes. In reaching its conclusion that FIRREA expressly preempts New York's statutorily rent-regulated tenancies and that New York law is in conflict with FIRREA, the court has displaced almost fifty years of rent regulation in New York.

As a result, New York's historic exercise of its emergency police powers in the area of housing is severely threatened. Moreover, in stating that 12 U.S.C. § 1821(e)(1) preempts "volumes of state law" (11a), the Second Circuit has signalled to all of the states that RTC has unfettered power to preempt state laws, even those which have historically been left to the states to protect their citizenry.[18]

A. The Second Circuit's Decisions Conflict With Relevant State And Federal Case Law

As noted previously, under § 1821(e)(1) of FIRREA, RTC may "disaffirm or repudiate any contract or lease" to which the institution is a party and which the RTC deems burdensome. Focusing on what it termed the "voluntary" nature of New York's rent-controlled and rent-stabilized tenancies, the Second Circuit concluded that FIRREA authorizes RTC to repudiate and disaffirm such tenancies. The court's decisions are in direct conflict with the relevant New York cases and federal case law.

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[18] The Federal Deposit Insurance Corporation will continue to have such power after RTC ceases to exist. 12 U.S.C. § 1441a(b)(4).

In New York, a tenant occupying a rent-controlled or rent-stabilized apartment does not have a mere contractual relationship with the landlord. While New York's statutory tenancies are commenced by a voluntary agreement, in the sense that the landlord *originally* agreed to rent a unit to a particular tenant, once the tenancy exists, the only remaining voluntary aspect of the relationship is that the tenant can leave at certain times and under certain terms. For the landlord, once the original landlord/tenant relationship is agreed to, all aspects of the relationship are statutorily controlled, so long as the laws are in effect. Most significantly, rent and duration, the two critical elements that the circuit court viewed in its original decision as the "core" aspects of a tenancy and which are "indispensable to the creation of the tenancy" (42a), are controlled by statute. While the landlord-tenant relationship may have commenced by agreement, after the initial "coming-together" of the parties, the emergency rent regulation statutes take over and define the tenancy.

Indeed, both state and federal courts have consistently held that rent-controlled and rent-stabilized tenants are "statutory" not "contractual" tenants. New York's highest court addressed this issue in *Whitmarsh v. Farnell*, 298 N.Y. 336 (1949). There, a landlord sought to evict a tenant with whom he had voluntarily entered into a lease agreement. The New York Court of Appeals held that since the lease was thereafter governed by New York's rent control statute, the tenant's "occupancy of the apartment after his lease expired was not under any agreement express or implied but by virtue of a compulsion exerted on the landlord by the local emergency rent law which allowed him to remain in possession." *Id.* at 343. *See also Matter of Duell v. Condon*, ___ N.Y.2d ___ (1995); 1995 WL 50702 (N.Y. 1995) (rent-controlled tenants maintain their apartments not by contract but by operation of law); *Stern v. The Equitable Company Trust of New York*, 238 N.Y. 267 (1924) (emergency rent laws preclude eviction upon expiration of lease); *Charlotte Realty Co. v. Lubarsky*, 133 Misc.2d

785 (App. T. 2d & 11th Dist. 1986) (tenant who remains in possession pursuant to law is statutory tenant); *Park Summit Realty Corp. v. Frank*, 107 Misc.2d 318, 323 (App. T. 1st Dep't 1980) (upon expiration of original term of lease, tenant becomes statutory tenant), *aff'd*, 84 A.D.2d 700 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1025 (1982); *De Santis v. White Rose Associates*, 152 Misc.2d 567 (Sup. Ct. N.Y. Co. 1991) (rent-stabilized tenancies are not terminated upon foreclosure).[19]

Similarly, in *In re Friarton Estates*, 65 B.R. 586 (S.D.N.Y. 1986), the Bankruptcy Court held that a trustee in bankruptcy may not remove rent-controlled tenants from apartments owned by the debtor. In so ruling, the court, relying on *Whitmarsh v. Farnell*, 298 N.Y. 336, specifically held that "the occupancy of a statutory tenant is not under any agreement, express or implied, but by virtue of the compulsion exerted on the landlord by local emergency rent laws. . . ." 65 B.R. at 592. *See also Matter of Chicago, Rock Island and Pacific Railroad Co.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied sub nom Kent v. Sanborn Cooperative Grain Co.*, 475 U.S. 1047 (1986) (rejecting trustee's argument that application of Iowa rent control law was preempted by the Bankruptcy Law); *Boston Rent Equity Board v. Dime Savings Bank of New York, FSB*, 611 N.E.2d 245 (Mass. 1993) (rent regulation applies after foreclosure irrespective of whether agreement exists).[20]

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[19] Although the circuit court claimed to "defer to state court pronouncements regarding the definition of property rights" in reaching its first analysis, the court, in fact, chose to rely on the State's general body of property law and totally disregarded the body of New York law which addresses the specific property rights involved in this case, thus ignoring the entire body of New York law which defines rent-regulated tenancies. Moreover, the cases cited by the circuit court do not even hold that these tenancies are non-statutory in nature. Rather, they simply state that certain contractual terms continue to govern the landlord-tenant relationship even after the lease expires.

[20] In its first decision, the Second Circuit pointed out that the Bankruptcy Code expressly permits a tenant to continue in occupancy if otherwise allowed to do so under a non-bankruptcy law such as New

The Second Circuit not only failed to apply these cases correctly to the statutory language of FIRREA, but also ignored the fact that RTC did not demonstrate (*Maryland v. Louisiana*, 451 U.S. 725, 746 [1981]), through the legislative history of FIRREA, that the phrase "contract or lease" was to be applied to include individual rights provided by state statute. In fact, other circuit courts, contrary to the Second Circuit's rulings in this case, have held that individual rights provided by state law are not preempted by the provisions of FIRREA. In *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990), for example, the Fifth Circuit held that sections of FIRREA which imposed conditions on the validity of agreements against the interests of the FDIC did not preclude a maker of a note secured by a deed of trust from asserting her homestead claim under Texas law. In doing so, the court found that a person's right to the State's homestead exemption, analogous to the right of a non-purchasing tenant here to remain in occupancy, "exists independently of any agreements between the parties." *Id.* at 543. (citation omitted).[21] *See also Motor City of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 39 F.3d 292, 299-300 (11th Cir.

York's rent control law. In suggesting that this was the sole basis for the *Friarton* court's determination, the Circuit ignored the Bankruptcy Court's emphasis on the non-contractual nature of a rent-controlled tenancy as well as the Bankruptcy Court's reference to the Seventh Circuit's *Rock Island* case and to the fact that compliance there with the state rent control law "might frustrate federal policy designed to maximize the selling price of a bankrupt railroad's assets." 65 B.R. at 591.

[21] In *Patterson*, the Fifth Circuit applied the three-factor test of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979), and "decline[d] to establish federal common law that would abrogate the well-established Texas law . . . protecting citizens' homesteads." 918 F.2d at 544. The court relied principally on "the disruption of state commercial relationships", *id.* at 544, that would occur if it were to abrogate citizens' well-established right under Texas law not to be forced from their homesteads. Citizens of New York, like citizens of Texas, have a well-established right under the State's rent control and rent stabilization laws not to be evicted from their homes. Because the Fifth Circuit's *Kimbell Foods* analysis applies with equal force to this case, its decision in *Patterson* conflicts with the Second Circuit's analysis.

1994) (tort claims arising outside of agreement are not barred by 12 U.S.C. § 1823[e]); *Villafane-Neriz v. FDIC*, 20 F.3d 35, 41-42 (1st Cir. 1994) (assignment required by state law not part of "agreement"); *Hanson v. FDIC*, 13 F. 3d 1247, 1252 (8th Cir. 1994) (party can maintain tort claims where tort is independent of agreement).

Most recently, this Court reaffirmed that contractual obligations are distinct from obligations imposed by state law. *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995). In that case, the Court found that while state regulations affecting airlines were preempted under the Airline Deregulation Act of 1978, enforcement of contract terms made by the parties was not so preempted. *See also Cippollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) (preemption of state law does not bar common law claims).

Here, as demonstrated above, the rights of the affected tenants to occupy their apartments are grounded in state law. The character and essential terms of their tenancies are found not through any contractual agreement with their landlord but, rather, through state statutory provisions governing residential apartments in New York City. The Second Circuit's contrary conclusion misreads FIRREA and applicable state law.

The circuit court's decision on remand also misconstrues this Court's pronouncements in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048. In *O'Melveny* the Court held that state law should define "rights" under 12 U.S.C. § 1821(d)(2)(A)(i) and that therefore, California law, not federal law, determines the rights of the lending institution that existed *prior to* receivership of the institution. *Id.* at 2054. 12 § 1821(e)(1) is similar to 12 U.S.C. § 1821(d)(2)(A)(i) in that the referenced "rights" are rights relating to "any contract or lease . . . *to which the institution is a party*." (emphasis added). Applying *O'Melveny* to the facts in this case, Nassau Federal's rights did not permit termination of the tenancies in question because the tenancies were statutorily mandated under state law and were

not, during the period of a declared housing emergency, part of any contract or lease to which the institution was a party.[22] By creating a federal definition of contract or lease, the circuit court erroneously failed to distinguish the tenant's statutory rights from any conceivable contract rights. *Id.*; *American Airlines v. Wolens*, 115 S. Ct. at 824-826.

Besides being in conflict with *O'Melveny* and *American Airlines*, the circuit court's decisions are also in conflict with *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994). In *Artley*, the Eleventh Circuit, applying *O'Melveny*, determined that a state law statute of limitations controlled even though the source of RTC's authority to bring gross negligence claims on behalf of a failed institution may be grounded in federal law. 28 F.3d at 1102-1103. The Second Circuit's decision that "when the RTC *does* exercise its federally-granted power to repudiate a contract or lease, its power to do so is not subordinated to state statutes or regulations", (11a) (emphasis in original), directly conflicts with the Eleventh Circuit's interpretation of *O'Melveny*.

The Second Circuit also justified its decision by holding that even if the statutory rights of tenants to remain in their apartments were not to be considered part of a "contract or lease", the applicable rent regulation laws would nevertheless be preempted because such laws would be in conflict with FIRREA's goal to stem the "financial hemorrhaging" of a large number of failed institutions. This conclusion is erroneous. As the district court correctly stated below, if FIRREA does not authorize RTC to repudiate statutory tenancies, RTC has no power to evict tenants and its repudiation of statutory tenants cannot be part of the objectives of Congress. Moreover, this analysis is inconsistent under *O'Melveny*, which counsels that such concern over maximizing money should be

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[22] RTC, as conservator or receiver, "steps into the shoes" of Nassau. *O'Melveny & Myers v. FDIC*, 114 S. Ct. at 2054. Obviously, since Nassau Federal was not a "party" to state law rights held by the tenants, it cannot terminate such rights under the plain language of § 1821(e)(1).

rejected. "[T]here is no federal policy that the fund should always win." *O'Melveny & Myers v. FDIC*, 114 S. Ct. at 2055.[23]

Under a correct interpretation of *O'Melveny*, there is no substantial conflict here between FIRREA and New York law. Nassau Federal loaned monies based upon the value of these units as rent-regulated. The asset RTC now owns is exactly that same asset and it can be sold at any time as occupied units. What the Second Circuit's decisions do is permit RTC to obtain a windfall by first evicting the tenants and then selling the units as vacant.

In addition, the circuit court misapplied the FIRREA provision which gives tenants the right to remain in their apartments for the full term of their leasehold. 12 U.S.C. § 1821(e)(5)(A)(ii). Under New York law, the term or duration of a rent controlled tenancy lasts for "so long as [the tenant] continues to pay the rent." N.Y.C. Admin. Code § 26-408 (reported following N.Y. Unconsol. Law § 8617 [McKinney 1987]) (governing rent-controlled tenants). *See also* 9 NYCRR 2524.1(a) (similar provision governing rent-stabilized tenants); *130 West 57th Corp. v. Hyman*, 66 N.Y.S.2d 332, 334 (App.T. 1st Dept. 1946) ("so long as a tenant continues to pay the rent to which the landlord is entitled he may not be removed from the premises"). In each instance, these tenant rights exist only so long as the state and city law is periodically renewed. The Second Circuit nevertheless decided on remand that a rent-controlled tenancy may, for purposes of FIRREA implementation, be terminated one year after notice of repudiation is given and that a rent-stabilized tenancy ends when the current statutorily-mandated lease expires. This delineation of a tenancy term is artificial and contrary to the letter and spirit of state law.

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[23] As the district court stated below, "[t]he congressional mandate of § 1441a(b)(3)(C) (to maximize the assets), however, is an instruction to the RTC on how to exercise the powers granted to it under sections of FIRREA; it is not a grant of power itself." 801 F.Supp. at 1163.

B. The Circuit's Decisions Are Inconsistent With The Strong Presumption Against Preempting A State From Exercising Its Historic Police Powers, and Ignore The Cooperative Relationship Which The Federal Government Seeks To Maintain With State Systems of Housing

A strong presumption exists against preempting a state from exercising its historic police powers. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. at 2617. Absent explicit authority to override such powers, RTC should not be permitted to disaffirm the tenancies in question. *BFP v. RTC*, 114 S. Ct. 1757, 1765-1766 (1994) ("where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation. . . .").[24] This principle has special application here since, as the Third Circuit has stated, "FIRREA is awkwardly written and difficult to interpret." *Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843, 849 (3rd Cir. 1994).

In ruling that New York's rent control and rent stabilization laws may be preempted by RTC fiat, the Second Circuit disregarded this presumption. In addition, the court ignored the fact that the federal government generally seeks to maintain a cooperative relationship with state systems of housing. *Kargman v. Sullivan*, 552 F.2d 2 (1st Cir. 1977); *Rowe v. Pierce*, 622 F. Supp. 1030, 1033 (D.D.C. 1985). The area of landlord/tenant law at issue here is an area traditionally left to the states. *Id.*

Indeed, it is well-established that "[c]oncepts of real property are deeply rooted in state traditions, customs, habits and laws." *RFC v. County of Beaver*, 328 U.S. 204, 210 (1946). When intruding upon "relationships traditionally governed by state law", this Court has found that the need for uniformity

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[24] Unlike 12 U.S.C. §§ 1464(p), 1821(m)(10) and 1823(k)(1)(A)(i) which expressly provide for override of state laws, § 1821(e)(1) contains no such language.

under federal law can be "outweighed by the severe dislocation to local property relationships. . . ." *United States v. Brosnan*, 363 U.S. 237, 240-242 (1960).

Here, where New York's rent control laws have been in effect, in various forms, for more than fifty years, and survived numerous constitutional challenges in federal and state courts, the circuit court's decisions significantly undermine the historic balance of states' rights and federal power.

CONCLUSION

For the reasons stated above, this petition for a writ for certiorari should be granted.

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Respectfully submitted,

VICTORIA A. GRAFFEO
Solicitor General

GARY R. CONNOR
Assistant Attorney General
Counsel of Record

KAREN S. SMITH
Assistant Attorney General
Of Counsel

DENNIS C. VACCO
Attorney General of the
State of New York
Petitioner Pro Se and Attorney for Petitioners Holland and the New York State Division of Housing and Community Renewal
120 Broadway - 23rd Floor
New York, New York 10271
(212) 416-8170

New York State Division of
Housing and Community
Renewal
Cullen McVoy
Richard Hartzman
Of Counsel
Attorneys for Petitioners
Holland and DHCR
One Fordham Plaza
Bronx, New York 10458
(718) 563-5836

DON D. BUCHWALD
Buchwald & Kaufman
Attorney for Petitioner
Susan Solomon Pattulo
600 Third Avenue
New York, New York 10016
(212) 661-0040

COLLEEN F. MCGUIRE
Attorney for Petitioner
Lloyd Ribner, as Executor
of the Estate of Muriel Rib-
ner, deceased
349 Broadway, 2nd Floor
New York, New York 10013
(212) 431-3112

ELI R. MATTIOLI
Wein, Malkin & Bettex
Attorney for Petitioner
Selma Diamond
650 E. 42nd Street
New York, New York 10165
(212) 687-8700